Supreme Court of the United States

OCTOBER TERM, 1944

No. 614

MUEHER STEEL BARREL COMPANY, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

Your petitioner above named, respectfully shows:

The petition of your petitioner was duly filed herein October 20, 1944 for a writ of certiorari to review a judgment made July 21, 1944 by the United States Circuit Court of Appeals for the Third Circuit affirming a decision of The Tax Court of the United States entered May 12, 1943; said petition was denied by this Honorable Court March 26, 1944 and within twenty-five days thereafter, to wit on April 20, 1945 an order was made herein by the Honorable Owen J. Roberts, Associate Justice of the Supreme Court of the United States on the appli-

cation of the undersigned counsel for said petitioner, extending to and including May 1, 1945 the time for filing a petition for rehearing in the above entitled cause. This petition is filed within such enlarged time.

Rehearing should be granted for reasons herein stated and writ allowed for reasons set forth in the original petition, overlooked or brought into greater significance and emphasis, since filing of the original petition herein, by the decision of this court in the Court Holding case (#581 this term).

1. The petition for certiorari in Commissioner of Internal Revenue v. Court Holding Company (#581, October Term, 1944) was filed October 11, 1944, nine days prior to the filing of the petition in the cause at bar. Certiorari was granted in that cause November 20, 1944, but determination of the application for certiorari at bar, was apparently held in abeyance pending the briefing and argument of that cause. At the first adjourned session date, March 26th, following the decision of reversal by this court in the Court Holding case March 12th, this Honorable Court denied the certiorari petition at bar. The Solicitor General in his petition in the Court Holding case had claimed (p. 15), a conflict in decisions of various circuits and that (p. 16): "4. Resolution of the conflict is of considerable practical importance. * * * The decision of the court below leaves the Tax Court with a confusing array of conflicting principles by which to guide itself." In the Commissioner's memorandum in response to the petition at bar, it was asserted (p. 13) "Since we have asserted in that petition (Court Holding case) that that case and the instant one are in conflict, we do not oppose the issuance of a writ herein, if the writ is to be granted in that case." The brief of respondent in the Court case made no mention whatever

of the Meurer case and of the substantial and significant elements which removed it from the border line position in which the Court case may be said to have been placed, nor was any mention of the Meurer case made by respondent's counsel in the oral argument before this court, attended by the undersigned counsel.

2. Allowance of a writ and hearing in the Court Holding case touched and settled only a narrow phase of the broad questions common both to the Meurer and Court Holding cases. The opinion of this court, upon the reversal in the Court Holding case, clearly settles the law on the lesser one of two phases common in that and the instant cases, namely that phase pertaining to *negotiating parties whose minds have met prior to a corporate liquidating distribution;* the distribution properly may be disregarded and subordinated to the ensuing sale by the recipient of the liquidating distribution, in the sole undisturbed judgment of the Tax Court. We respectfully submit that had the Meurer case been reviewed and considered in conjunction with the Court Holding case—as, we respectfully urge was the natural hope of the Assistant Attorney General and petitioner's counsel,—there would have been settled the remaining open and conflicting questions of much wider application, broader scope and universal interest than the narrow question involved in the Court Holding case.

3. **Residual question involved below:**

May an inference of corporate intention to sell business assets be predicated solely on the following circumstances and proofs, which is the maximum that can be claimed by the respondent in this case, i.e.:

(a) Grant by individual stockholders of an option to one of their number to purchase their capital shares in that corporation;

(b) Initiation by a corporation of steps leading to a liquidation of its business, distribution of its business assets and retention of its securities;

(c) Concurrent initiation of anticipatory negotiations by those stockholders with the optionee's assignee for sale of the business assets;

(d) *Consummation of the corporate plan of liquidation* and actual distribution of those business assets to the stockholders *before* conclusion of the negotiations by the stockholders and *before meeting of minds on terms of* proposed substitution of the *sale* of business assets for a prescribed exercise of option for shares, and

(e) Sale of those business assets by the stockholders to the optionee's assignee, five days after the stockholders had obtained absolute title under the liquidating distribution plan.

4. The decisions below and denial of a writ have evoked widespread and keen public interest, discussion, comment and concern in the corporate income tax field. Inquiries to undersigned counsel have ranged from Los Angeles to Philadelphia and New York. Meetings of tax experts have been held to discuss the present unsettled state of the law following the reversal of the Court Holding case and the denial of the Meurer certiorari petition. The confusion to which the Solicitor General referred in his petition has not been eliminated by the Court Holding reversal and the denial of certiorari in the Meurer case but has in fact been enhanced or aggravated. This is borne out by an analysis of the

opinion of this court in the Court case, and the application of each significant element therein indicated, to the facts, evidence, or situation of the case at bar.

5. The opinion of Mr. Justice Black in Court Holding case clearly and properly shows that there was conflicting evidence in that case and that the Tax Court findings were supported by the record. The points brought out in that opinion when compared to the case at bar, show a striking dissimilarity, completely ignored in the inadequate presentation, briefing and argument of that case, i.e.:

(a) In that case, "an oral agreement was reached as to the terms and conditions of sale and * * * the parties met to reduce the agreement to writing" before any one even dreamed of a "liquidation". Here, negotiations for sale of corporate assets were initiated on July 9th *subsequent* to the launching of a corporate program for holding a meeting to consider the corporate plan for divestment of corporate business assets and retention of corporate security assets. Here, when the discussions respecting the possibility of a purchase of assets in lieu of exercise of an option on shares were so initiated July 9th, there was already in existence (since June 28) the declared purpose of the negotiating individuals to distribute such assets in liquidation under the plan for complete liquidation then in the process of formulation. Here, moreover, when the negotiations commenced, the prospective purchaser did not know whether either the corporation or the stockholders would ever consent to a sale of business assets. Here, there is no showing that the prospective purchaser was ever ready to purchase the assets upon the terms which ultimately eventuated, until five days after the liquidating distribution was completely effected.

(b) There (in the Court Holding case) the deal was called off by the corporation's attorney who specifically advised the purchaser "that the sale could not be consummated because it would result in the imposition of a large income tax on the corporation". Here, no deal was ever called off by the corporation. True, at bar, an option with respect to *shares* was outstanding prior to the distribution meetings, but there is no showing that the option was ever exercised according to its terms, or that either the optionee, or its assignee, was ready to exercise the option according to its terms prior to the liquidating distribution.

(c) There, the parties during negotiations had definitely in mind only a sale by the corporation—the sale was consummated by the stockholders only after full terms were previously negotiated by and on behalf of the corporation on the one hand and the ultimate purchaser on the other hand. Here, at no time prior to sale of assets by the recipients of the liquidating dividend, was a sale on the corporate behalf broached, discussed or even contemplated.

(d) There, the agreement drawn by the parties subsequent to the liquidating distribution "embodied substantially the same terms and conditions previously agreed upon". Here, no complete, definitive terms were fixed prior to the distribution and suggestions for terms were in a state of flux; two weeks' negotiations were required amongst and between the prospective purchaser's attorneys and the attorney for the partners before an agreement finally eventuated five days after the distribution. At bar the negotiators were dealing not with a simple asset, such as the single piece of property involved in the Court case, but with a complicated, substantial, going business and all its ramifications.

(e) There, when the formal conveyance and distribution was made, nothing remained to be done to effectuate a resale to Miller other than a mere substitution of the individual names for the corporate name in the formal agreement; no further negotiations regarding terms were needed or had. Here, negotiations regarding terms and provisions of a prospective deal were not concluded until five days after the tax consequences of the liquidating distribution had vested, become fixed and irrevocable. Here, there was no evidence that any part of the substantive changes sought by optionee (or assignee) to convert a share-option into a business-assets sales contract had, in fact, been assented to, by the corporation, or the shareholders, prior to the distribution.

(f) There, an actual payment to the corporation prior to the liquidation "was applied in part payment of the purchase price". Here, there was no payment on account to the corporation or partnership until after the liquidating dividend was completely distributed and the terms agreed upon. No payments here were made to the petitioner.

(g) There, the Tax Court had a factual basis for its conclusion that the corporation "had not abandoned the sales negotiations". Here, there isn't a scintilla of evidence to sustain a finding that there were any corporate negotiations whatever prior to the liquidation, nor to sustain the conclusion that *petitioner's* end in view was the sale of the corporate assets at a time when its *shareholders individually* granted an option on their shares. There, the Circuit Court and the Tax Court merely differed in the inferences to be drawn from the record. Here, the Circuit Court improperly deemed the Dobson case as a bar to an adequate consideration of the point raised by the petitioner to the effect that there was no

factual or evidentiary basis for the conclusions upon which the Tax Court decision was predicated.

6. A grievous injustice was inflicted upon the petitioner when its position was frozen for a while and its rights then permanently barred and foreclosed by the consideration of a case, much narrower in scope, where the attorney for the Court Holding Company made no attempt to meet the issues raised in the Commissioner's brief regarding the Meurer and other cases relied on. The respondent's brief in No. 581 cites only the Dobson case and makes no mention whatever of any of the other dozen or so cases cited by the Commissioner both in that case and in the case at bar. No adequate consideration of issues underlying the case at bar could be had without discussion of the two parallel cases upon which we respectfully rely in urging reconsideration of our petition and allowance thereof, namely: Commissioner v. Falcon, 127 F. (2d) 277; Chisholm v. Commissioner, 79 F. (2d) 14. Neither of these cases was cited in the Court Holding Company brief either in the Circuit Court or in the Supreme Court. Both were relied on strongly by us in all courts as requiring a reversal of the decisions below. To the extent that the case below bars expectant stockholders from anticipatory negotiations and dealings on their own account with a prospective purchaser, it is in conflict with a more recent case of the Tax Court: George T. Williams v. Commissioner, 3 T. C. 1002 (pp. 9, 29 of our petition).

7. The established law applicable to the situation disclosed at bar and the equities of this case inherent therein, impelled a conclusion that the corporate distribution below was in good faith planned prior to the initiation of negotiations for the purchase of business assets and effectually

concluded by an actual irrevocable distribution of those assets in liquidation prior to a meeting of minds of the negotiators. The courts below completely lost sight of the fact that all tax consequences of the distribution and liquidation which occurred herein July 17, 1937 were completely crystalized and irrevocable before there was a full meeting of minds between and among negotiating parties. In the case at bar there was no reasonable certainty that after effectuation of the voted distribution in liquidation, the negotiating prospective purchaser would in fact, come to terms and close the purchase of the distributed assets thereafter. In that respect this case differs completely and vitally from the Court Holding Company case (No. 581 October Term, 1944) in which this court properly reversed the Circuit Court and sustained the Tax Court.

8. It is respectfully submitted that by a process of judicial construction and improper subservience of the facts in this case to the rule of the Dobson case (Dobson v. Commissioner, 320 U. S. 489) the courts below have rendered nugatory the express will of Congress as enacted in the Statute (cited in our petition and brief) and the regulations in support thereof, so that, if permitted to remain unreversed, no distribution in liquidation, however well intentioned, may safely be planned by corporate controllers if subsequently the asset distributed should be resold or otherwise summarily disposed of by the distributees.

Prayer

WHEREFORE your petitioner prays that rehearing of its petition may be granted and thereon a writ of certiorari issue to the United States Circuit Court of Appeals for

the Third Circuit as sought in its petition dated October 18, 1944 filed herein October 20, 1944.

New York, April 28, 1945.

Respectfully submitted,

EMANUEL A. STERN,
Counsel for Petitioner,
Meurer Steel Barrel Co., Inc.

Certificate

TO THE SUPREME COURT OF THE UNITED STATES:

The undersigned, EMANUEL A. STERN, counsel for petitioner, Meurer Steel Barrel Co., Inc., hereby certifies that the foregoing petition for a rehearing is presented on behalf of the petitioner in good faith and not for delay.

Dated, April 28, 1945.

Respectfully submitted,

EMANUEL A. STERN,
Counsel for Petitioner,
Meurer Steel Barrel Co., Inc.